Supreme Court, U.S.
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No. 93-1042

Supreme Court of the United States

October Term, 1993

VINCENT DESALVO AND JACK HARRIS,
Petitioners,

–against–

STATE OF LOUISIANA AND THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are attorneys who use certain public records to solicit legal business. Respondents prohibited petitioners' use of these records, and their solicitations, by restricting public access to the records.

May respondents deny the petitioners access to these records, and consequently their right to targeted direct mail solicitation, consistently with the guarantee of freedom of speech embodied in First and Fourteenth Amendments to the United States Constitution and Shapero v. Kentucky Bar Association, 486 U.S. 466?

PARTIES TO THE PROCEEDING

The petitioners are Jack Harris and Vincent DeSalvo. The respondents are the State of Louisiana and the Louisiana Department of Public Safety and Corrections.

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No.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners herein respectfully request that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Louisiana entered in this action on September 3, 1993.

OPINIONS BELOW

The decision of the district court is unreported. It is reprinted in appendix B hereto. The opinion of the Supreme Court of Louisiana is not yet reported. This opinion is reprinted in appendix A hereto.

JURISDICTION

The final judgment of the Louisiana Supreme Court (Appendix A) was entered on September 3, 1993. This Court has jurisdiction to review this judgment pursuant to 28 U.S.C. 1257(a) because the validity of a state statute is drawn in question on the ground that is repugnant to the Constitution of the United States. See also McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18, 26 as to state as defendant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law.. abridging the freedom of speech...

United States Constitution, Amendment XIV:

> ...[N] or shall any state deprive any person of life, liberty, or property, without due process of law;...

Louisiana Revised Statute 32:398(D)(4):

> ...
>
> The state police, any local police department, or any sheriff's office shall provide copies of accident reports to any interested person upon request and may charge a fee, not to exceed the sum of five dollars per report.

This case also involves Louisiana Revised Statutes 32:398 (H) and 44:4(24). These provisions are set forth in Louisiana Act 878 of 1992 (Appendix F hereto).

STATEMENT OF THE CASE

Prior to August 21, 1992, petitioners, attorneys in the State of Louisiana, used certain public records to develop their legal practice. These records, reports of motor vehicle accidents, contained the names and addresses of persons involved in accidents in the state. Petitioners used these names and addresses to provide accident victims with information about their legal rights through direct mail solicitation. The state Department of Public Safety was required to provide the information contained in the reports to any interested person upon request (La. Rev. Stat. 32:398 (D)(4)). Further, the state Public Records Law (La. Rev. Stat. 44:1 et. seq.) required the Department to allow any person of the age of majority to inspect, copy or reproduce these reports. These provisions permitted petitioners access to the reports.

In 1992, by Act 878 (Appendix F), the state restricted the availability of information contained in these previously public records. Specifically, the information in the reports was restricted to certain parties directly connected with the accident and to members of the press. These restrictions were enacted (by Act 878) in La. Rev. Stat. 32:398 (H) and La. Rev. Stat. 44:4(24). The information is no longer available to petitioners. As a result of the new law, petitioners are no longer able to send information about their services to potential clients who may have specific needs for petitioners' services.

HOW THE FEDERAL QUESTION WAS RAISED

In the Nineteenth Judicial District Court for the State of Louisiana, petitioners first raised the federal issues in question in Paragraph 8 of their First Amended Petition (Appendix D):

> Petitioners further assert that the stated intent of Act 878 is to deny petitioners

> the constitutionally protected right under the First Amendment of the United States Constitution to mail written communications to potential clients. Petitioners therefore assert that Act 878 violates the First Amendment to the United States Constitution.

Further, petitioners raised the federal issues in question in their Supplemental Memorandum. (Appendix C):

> The bottom line is that this legislation was enacted for the sole purpose of preventing attorneys and chiropractors from mailing solicitation letters known to have particular legal or medical problems...The State of Louisiana cannot claim a legitimate state interest in prohibiting the exercise of First Amendment rights under the Constitution of the United States of America.

The issue was noted by the trial court in its written reasons for judgment on September 4, 1992 (Appendix B) in footnote 7.

> The State of Louisiana has no legitimate or appropriate interest in preventing the exercise of the First Amendment right of lawyers to mail solicitation letters to potential clients. Shapero v. Kentucky Bar Association, supra.

However, the trial court did not decide the federal issue, finding that the statutes violated the equal protection clause of the state constitution.

The federal issue was raised again at page 7 of petitioners' Original Brief in the Louisiana Supreme Court:

(A) Act 878 Violates First Amendment rights under the United States Constitution of Appellees

The primary, if not exclusive, motivation and intent of Representative Downer in introducing and passing Act 878 is to stop Appellees from exercising their First Amendment right to mail solicitation letters to potential clients known to face specific legal problems. The United States Supreme Court, in the case of Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988), specifically held that a State may not, consistent with the First and Fourteenth amendments, categorically prohibit lawyers from soliciting legal business from pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. Thus, Act 878 was proposed for an illicit purpose, i.e., to prevent Appellees from sending solicitation letters to potential clients. Any statutory scheme designed to frustrate the exercise of First Amendment rights must fall.

Petitioners position on the federal issue was expressly considered, discussed, and denied by the Supreme Court of Louisiana in its opinion on September 3, 1993 (Appendix A, pg. 6-7a).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH A DECISION OF THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS, WHICH HELD THAT THE FIRST AMENDMENT DOES NOT PERMIT A STATE TO PREVENT PROFESSIONALS FROM DIRECT MAIL SOLICITATION BASED UPON ACCIDENT RECORDS.

In Innovative Database Systems v. Morales, 990 F.2d 217 (5th.Cir. 1993), the Fifth Circuit declared unconstitutional a Texas statute that prohibited the use of motor vehicle accident reports by professionals to solicit business.

Plaintiffs in the Innovative case were database vendors in the business of reselling accident reports to attorneys and chiropractors and Texas chiropractors who used the information to solicit potential clients. All of the plaintiffs were prevented from using the previously public information for their business purposes. The court, citing Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) and Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988), held that the Texas statute violated the First Amendment (through the Fourteenth Amendment) rights of the plaintiffs. Specifically, the court found the statute unconstitutional because the purported state interests for the statute were not advanced by its total ban on the use of public information for solicitation.

Unlike the Texas statute, the Louisiana statutes (added by Act 878, Appendix F) do not prohibit the sale of accident reports to data vendors. Further, they do not, on their face, prohibit the use of accident reports for solicitation purposes. However, as applied to petitioners, the Louisiana statutes, like the Texas statute, operate as a total ban on their use of the information. According to the Fifth Circuit, such a ban is forbidden by both Zauderer, *infra*, and Shapero, *infra*. Thus, the Louisiana Supreme Court in the decision

below is in conflict on this issue with the Federal Circuit in which it sits.

The conflict between the United States Fifth Circuit and the Louisiana State Supreme Court should be resolved by this court. The First Amendment issue was squarely raised and decided by both courts; their decisions directly conflict with each other.

THE COURT BELOW DECIDED AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW IN A MANNER INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Further, the Louisiana Supreme Court's decision conflicts with prior decisions of this Court. Specifically, it effectively allows a ban on direct mail solicitation by attorneys based upon public records. Rather than directly prohibit the solicitations, Louisiana has prohibited attorneys from obtaining the information upon which the solicitations may be made. This prohibition effectively forbids Shapero solicitations. Zauderer (at 638) held that a state may not restrict commercial speech "that is not false or deceptive and does not concern unlawful activit[y]" unless there is a "substantial government interest, and only through means that directly advance that interest." Neither petitioners nor respondents argue that petitioners' solicitation letters are false, deceptive or concern unlawful activity.

Some of the governmental interests involved are presented in petitioners' Supplemental Memorandum in the 19th Judicial District Court (Appendix C). The purported interests include preventing attorneys and chiropractors from sending solicitation letters to potential clients with specific needs. Theses interests are improper according to both Zauderer and Shapero. Further, if the state wishes to further its other interests, it has several less restrictive means of doing so according to Shapero (at 476).

This court should grant certiorari to clarify and affirm Shapero's command that states may not prevent attorneys from using targeted direct mail solicitation and to ensure that Louisiana may not enforce the laws enacted by Act 878 of 1992 because of this command.

THE LOUISIANA SUPREME COURT MISAPPLIED THE STANDARD FOR REGULATION OF COMMERCIAL SPEECH.

The Louisiana Supreme Court relies on Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, in upholding the Louisiana statute. The portion of Virginia cited by the court describes this Court's standard for "time, place, and manner" regulation of speech. The Louisiana regulation is not such a regulation, at least with respect to the cases the court cites. Assuming, *arguendo,* that the Louisiana statute is such a "time, place, and manner" regulation, the Louisiana Supreme Court is erroneous in approving the statute by this standard. The first element of the test set forth in Virginia (at 771) requires that the regulation is "justified without reference to the content of the regulated speech." The Louisiana Supreme Court states (Appendix A, pg. 5a):

> It is not disputed that the law's ban on disclosure of vehicular accident reports is content neutral and is not being applied because of disagreement with the message which the plaintiffs wish to disseminate to persons identified in the accident reports.

Of course, petitioners do dispute the content neutrality of the Louisiana statutes. In their Supplemental Memorandum to the District Court (Appendix C), petitioners presented evidence that the statutes were "justified" with "reference to the content of the regulated speech" through the testimony of Representative Downer.

The proper standard by which the laws at issue, and other laws which seek to regulate commercial speech, should be tested is contained in Central Hudson Gas & Elec. v. Public Service Commission, 447 U.S. 557, 566.

This court should grant certiorari in order to clarify the application of the Central Hudson test to the commercial speech of attorney advertising.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF LOUISIANA

No. 92-CA-2882

VINCENT DESALVO AND JACK HARRIS

v.

STATE OF LOUISIANA AND THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

On appeal from the Nineteenth Judicial District, Parish of East Baton Rouge

Judgement Entered September 3, 1993

Dennis, Justice.*

The crucial question in this case is whether a law which prohibits disclosure of state motor vehicle accident reports to anyone except a party to an accident, his or her representative, attorney and insurer, the press, and contractors for on-line driving records, violates the First Amendment rights of lawyers engaged in advertising who seek to gather information from the reports targeting potential clients for mass direct mail solicitations. The trial court declared the law unconstitutional as violative of the state constitutional right of equal protection of the laws. Although that court did not reach the plaintiffs' First Amendment challenge, it indicated that the law may be unconstitutional on this ground also. The State of Louisiana and Department of Public Safety and Corrections appealed, and the plaintiffs re-urged all of their constitutional challenges, including their First Amendment attack. We reverse.

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* Lemmon , J. not on panel. Rule IV, Part 2, § 3.
Watson J. concurs and assigns reasons
Kimball J. dissents and assigns reasons

Lawyer advertising is in the category of constitutionally protected commercial speech. The First Amendment permits a state to impose restrictions on the time, place and manner of commercial advertising, as with regard to other varieties of speech, provided such restrictions are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. The law in question meets all of these requirements. The law is content neutral; it does not seek to regulate or censor lawyer advertising messages. The law leaves open all channels of lawyer advertising, including direct mail solicitations. The state's significant interest in protecting the right to privacy of individuals and their freedom from unnecessary public scrutiny is substantially furthered by the law. For similar and additional reasons hereinafter assigned, the law does not violate the state constitutional right of equal protection of the laws or right to examine public documents. La. Const. 1974, Art. I, §3; Art. XII, § 3.

BACKGROUND

The driver of a vehicle involved in an accident resulting in injury, death, or property damage in excess of $100 is required to file an accident report with the Department of Public Safety or, if the accident occurred in a city, with the city's police department. La. R.S. 32:398 (A) - (D). Police departments are required to forward such reports to the state Department of Public Safety. Id. (D) (3). Formerly, the state police, any local police department, or any sheriff's office was required to provide copies of accident reports to any interested person upon request. Id. (D) (3) (Supp. 1990). The Department was also required to permit any person the age of majority to inspect, copy, or reproduce any accident report as a public record. La. R.S. 44:31 (Supp. 1978); See Thornton v. Department of Public Safety, 536 So. 2d 595 (1st Cir 1988).

By Act 878 of 1992, the legislature added La. R.S. 32:398 (H) to provide that the reports of motor vehicle accidents shall be confidential, shall be exempt from the provisions of the public records law, R.S. 44:1 et seq., and shall be made available only to the parties to the accident, parents or guardians of a minor who is a party to the accident, the insurers of any party which is the subject of the report, or the succession representatives of those parties, or to the attorneys of the parties or succession representatives, or to a news-gathering organization that requests documents related to the accident. Also, La. R.S. 32:398 (H) provides that the public records law, which generally requires disclosure of state records to the public, shall not apply to vehicular accident reports but that the state may sell them or "other driving record information to consumers of on-line driving records under written contract." Id.

The plaintiffs, attorneys who previously obtained the names and addresses of parties to auto mishaps from the accident reports for direct mail solicitations, brought this action for a judgment declaring Act 878 of 1992 unconstitutional, contending that the law, by prohibiting their access to accident reports, denied them equal protection of the laws in violation of Article I, § 3 of the state constitution, violated their First Amendment right to commercial speech, and denied them the right to examine public documents in violation of Article XII, § 3 of the state constitution. After a hearing on the merits, the district court rejected the plaintiffs' claim that their state constitutional right to inspect public documents had been violated. However, the court declared the law unconstitutional as violative of the plaintiffs' state equal protection rights. Although the trial court did not formally reach the First Amendment issue, it plainly indicated that it found merit in the argument. The defendants appealed. La.Const.1974, Article V § 5 (D) (1).

I

As a general rule, the First Amendment provides that government has no power to restrict expression because of its

message, its ideas, its subject matter, or its content. Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). With respect to noncommercial speech, the Supreme Court has sustained content-based restrictions only in the most extraordinary circumstances. See Consolidated Edison Co. v. Public Service Comm'n of New York, 477 U.S. 530 (1980); Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 82 (1978). By contrast, regulation of commercial speech based on content is less problematic. In light of the greater potential for deception or confusion in the context of certain advertising messages, and the greater objectivity and hardiness of commercial speech, content-based restrictions on commercial speech may be permissible. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 771, n.24 (1976). Lawyer advertising is in the category of constitutionally protected commercial speech. Shapero v. Kentucky Bar Assn., 486 U.S. 466 (1988); See Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

In Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), the Supreme Court stated that the constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. Id. at 563. The Court then adopted a four-part analysis for assessing the validity of content-based restrictions on commercial speech as distinguished from more fully protected speech: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. Id., at 563-566.

A less stringent test applies, however, when the regulation does not flatly prohibit or restrict commercial speech because of its content but indirectly results in a stricture upon the flow of information or ideas because of a government measure seeking a goal independent of the communicative content or impact of the speech. The court has indicated that restrictions on the time, place and manner of commercial advertising may be imposed, as with regard to other varieties of speech, provided "that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." Virginia Pharmacy Board, 425 U.S. 748, 771 (1976), comparing Grayned v. City of Rockford, 408 U.S. 104 (1972); United States v. O'Brien, 391 U.S. 367 (1968); Kovacs v. Cooper, 336 U.S. 77 (1949); with Buckley v. Valeo, 424 U.S. 1 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cantwell v. Connecticut, 310 U.S. 296 (1940); and Saia v. New York, 334 U.S. 558 (1948); See also, Bates, 433 U.S. at 384.

Applying these principles, we conclude that Act 878 of 1992 is valid as a reasonable time, place, and manner regulation. The law meets all three of the requirements set forth in the Supreme Court's decisions.

First, the law meets the time, place or manner requirement that the regulation "may not be based upon either the content or subject matter of speech." Regan v. Time, Inc., 468 U.S. 641, 648 (1984) (quoting Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 536 (1980)). It is not disputed that the law's ban on disclosure of vehicular accident reports is content neutral and is not being applied because of disagreement with the message which the plaintiffs wish to disseminate to persons identified in the accident reports. Second, the statute was not faulted, nor could it be, on the ground that it failed to "leave open ample alternative channels for

communication of the information." Regan, 468 U.S. at 648 (quoting Heffron, 452 U.S., at 648; Virginia Pharmacy Board, 425 U.S. at 771). In fact, the law leaves open all channels of lawyer advertising, including direct mail solicitations.

Third, the law "serve[s] a significant governmental interest." Regan, 468 U.S. at 648 (quoting Heffron, 452 U.S., at 649; Virginia Pharmacy Board, 425 U.S. at 771). The statute narrowly focuses on the state's substantial interest in protecting the right to privacy of individuals, See La. Const. Art. I, § 3, which includes their right to be "let alone," Itzkovitch v. Whitaker, 115 La. 479, 482, 39 So. 499, 500 (1905), and to be free from "unnecessary public scrutiny". Trahan v. Larivee, 365 So.2d 294, 300 (La App 3d Cir 1978); Devlin, Privacy and Abortion Rights Under Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State, 51 La. L. Rev. 685, 691-92. The plenary power of the legislature, in exercising the police power of the state, to make all laws necessary and proper to that end is broad and sweeping. See, Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("The State's interest in protecting the well being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.") Pursuant to this power, the legislature may classify certain documents containing the accumulation of sensitive information about a person as confidential and exempt them from general public inspection. Legislation which insures that motor vehicle accident reports will not be disclosed except to the parties to an accident, their legal representatives, attorneys and insurers, the press, and insurance rate-making entities, serves a legitimate and substantial purpose in protecting individuals' right to privacy while reasonably accommodating the interests of the public in newsworthy public documents, the press in news-gathering and the insurance industry in rate-making information.

We conclude, therefore, that because of the state's substantial interest in assuring the privacy of its citizens, because amended La. R.S. 32:398 is an appropriately narrow means of

furthering this interest and does not affect the content of any communication, and because the statute preserves ample alternative channels of communication, the law does not violate the plaintiffs' First Amendment right to engage in lawyer advertising.

II

We conclude that La. R.S. 32:398, as amended by Act 878 of 1992, does not deny plaintiffs equal protection of the laws in violation of Article I, § 3 of the 1974 Louisiana Constitution for virtually the same reasons that it does not violate the First Amendment. Article I, § 3 provides: "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonable discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

In Sibley v. Board of Supervisors, 477 So.2d 1094, 1107-1108 (La. 1985), this court held that Article I, §3 commands courts to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification reasonably furthers a legitimate state purpose; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

Because the law does not establish any classification based

on race, religion, birth, sex, culture, physical condition, or political ideas or affiliations, the plaintiffs' challenge does not invoke our strict or heightened scrutiny under Article I, § 3. Therefore, the plaintiffs have the burden of demonstrating that they are disadvantaged by a legislative classification which is unreasonable because it does not further any legitimate state interest. In deciding that the law does not violate the plaintiffs' First Amendment rights, we concluded that the state carried its burden of showing that the statute furthers the significant state interest in protecting the right to privacy of individuals. Consequently, it necessarily follows that the plaintiffs failed to carry their onerous burden of proving the opposite, negative proposition that the law does not further any legitimate state interest. Furthermore, we concluded in our First Amendment analysis that the law reasonably furthered the state's legitimate objectives in adjusting the conflicts between the various public and private interests affected by the legislation. Consequently, it is evident that the plaintiffs did not show that any of the classifications drawn by the statute failed to further a legitimate state interest.

III

Article XII, § 3 of the 1974 Louisiana State Constitution provides that: "No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law." This court has held that this provision must be construed liberally in favor of free and unrestricted access to public documents, and that access can be denied only when a law, specifically and unequivocally, provides otherwise. Title Research Corp. v. Rausch, 450 So.2d 933 (La. 1984). In the present case, we conclude that La. R.S. 32:398 (H), added by Act 878 of 1992, specifically and unequivocally provides that the reports of motor vehicle accidents shall be confidential, shall be exempt from the provisions of the public records law, and shall be made available only to certain classes of persons. With

respect to the plaintiffs, lawyers seeking to inspect the accident reports for commercial advertising purposes, the statute clearly and unambiguously bars access. Accordingly, we affirm the trial court's rejection of the plaintiffs' claims based on this ground.

IV.

The plaintiffs argued that La. R.S. 32:398 (H) interferes with this court's power to regulate the practice of law and will encourage frivolous litigation because attorneys will have to confect contingent fee contracts without carefully evaluating claims before they may obtain accident reports. The short answer to this contention is that there is nothing in the statute, other laws, or the rules of this court which prevents a party to an accident from engaging an attorney, orally or in writing, with or without compensation, for the limited purpose of obtaining the accident report and giving prompt, efficient and economical advice or legal services to the client.

DECREE

For the reasons assigned, La. R.S. 32:398 (H), added by Act 878 of 1992, is not unconstitutional for any reason assigned by the trial court or argued by the plaintiffs herein. Accordingly, the judgment of the trial court is reversed.

REVERSED.

SUPREME COURT OF LOUISIANA

No. 92-CA-2882

VINCENT DESALVO AND JACK HARRIS

v.

STATE OF LOUISIANA AND THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

On appeal from the Nineteenth Judicial District
Parish of East Baton Rouge

WATSON, Justice, concurring.

Traffic accident reports are public records, and the public should be able to see those records, particularly since the legislation gives them to the press. Title Research Corp. v. Rausch, 536 So.2d 595 (La, 1984). The access restrictions in Act 878 of 1992 set a dangerous and questionable precedent.

Nevertheless, I respectfully concur in the result reached by the majority because the plaintiffs have not shown what constitutional right, if any, has been violated.

SUPREME COURT OF LOUISIANA

No. 92-CA-2882

VINCENT DESALVO AND JACK HARRIS

v.

STATE OF LOUISIANA AND THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

On appeal from the Nineteenth Judicial District, Parish of East Baton Rouge

KIMBALL, Justice, dissenting.

I respectfully disagree with the majority opinion that La. Rev. Stat. 32:398 (h), as added by Act 878 of 1992, furthers the legitimate state interest in protecting the rights of privacy of individuals. In my view, any privacy interest the statute purports to protect by denying attorneys access to accident reports is negated by permitting disclosure of the same accident reports to the press for mass media reporting. Thus, while I agree that protection of individuals' rights of privacy is a significant state interest, I do not agree that the legislation in this case furthers that interest. By the majority's own analysis, therefore, La. Rev. Stat. 32:398 (H) violates both the First Amendment of the U.S. Constitution and the equal protection clause of the Louisiana Constitution.

Moreover, to the extent the implicit purpose of La. Rev. Stat. 32:398 (H) is to limit attorney direct mail solicitation of accident victims, I believe the statute impermissibly intrudes upon this court's exclusive inherent power to regulate the practice of law. La. Const. art. V, § 5 (B). See Louisiana State Bar Assoc. v. Edwins, 540 So.2d 294, 298-99 (La. 1989); Saucier v. Hayes Dairy

Prod., Inc., 373 So.2d 102, 115 (La. 1979) (on rehearing). If there is a legitimate need to limit attorney direct mail solicitation, and if this need can be addressed in a manner consistent with the First Amendment, see Shapero v. Kentucky Bar Ass'n, 482 U.S. 466 (1988), Bates v. State Bar of Ariz., 433 U.S. 350 (1977), I do not believe it is within the ambit of the legislature to impose such restrictions on the practice of law, but rather is within the purview of the courts. Consequently, I would hold La. Rev. Stat. 32:398 (H) unconstitutional on the grounds that it violates the separation of powers principle that no one branch of our state government shall exercise powers belonging to the others. La. Const. art. II, §§ 1, 2.

APPENDIX B

NUMBER 384,535 DIVISION D

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

VINCENT J. DESALVO AND JACK PATRICK HARRIS

V.

THE STATE OF LOUISIANA AND DEPARTMENT OF PUBLIC SAFETY

WRITTEN REASONS FOR JUDGMENT

Plaintiffs brought this action for a declaratory judgment on the constitutionality of Act 878 of the 1992 Louisiana Legislature and injunctive relief from its enforcement. By agreement of the parties, a hearing on the merits was held on august 25, 1992. The matter was reassigned for ruling on September 4, 1992, and the parties were given the opportunity to file post-trial memoranda.

Act 878 relates to motor vehicle accident reports.[1] By its terms, the act makes accident reports confidential and exempt from the public records law (R.S. 44:1 et. seq.). Access to a particular accident report will be given only to the following:

> ....the parties to the accident, parents or guardians of a minor who is a party to the accident, and insurers of any party which is the subject of the report, or to the succession representatives of those parties,

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[1] Act 878 enacts R.S. 32:398 (H) and R.S. 44:4 (24).

> or to the attorneys of the parties or succession representatives, or to a news-gathering organization that requests documents related to the accident. (Emphases added.)

Plaintiffs are two attorneys who challenge the constitutionality of Act 878 on three grounds: (1) the act discriminates in favor of news gathering organizations and therefore violates the equal protection clause;[2] (2) the act infringes on the right to examine public documents;[3] and (3) the act denies plaintiffs their First Amendment rights to mail written communications to potential clients as recognized by the United States Supreme Court in Shapero v. Kentucky Bar Association[4].

The second basis asserted to prove the unconstitutionality of Act 878 can be disposed of initially. Article XII, Section 3 provides as follows:

> No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law. (Emphases added).

The Constitution recognizes the right of the state to exempt certain documents from the public records law. The state has already exempted certain records of prosecutive, investigative, and law enforcement agencies from disclosure.[5]

If a statute discriminates against a certain class or classes of individuals, the classification must further an appropriate state

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[2]Article I, Section 3 of the Louisiana Constitution
[3]Article XII, Section 3 of the Louisiana Constitution
[4]108 S.Ct. 1916 (1988)
[5]R.S. 44:3

interest in order to survive an equal protection challenge.[6] There must be a rational relationship between the discrimination scheme and a legitimate state interest.

The discriminatory scheme set forth in Act 878 is obvious. Accident reports are to be made available only to certain parties, and the focus in these proceedings has been on the access given the news media. Therefore, the inquiry is whether the state has a legitimate interest in the confidentiality of accident reports and if so, whether restricting access to all but the parties themselves, their representatives, insurers, and the news media furthers that interest.

At the evidentiary hearing, Representative Hunt Downer, the sponsor of the Act, testified regarding the intent behind its passage. The essence of his testimony was that he wanted to restrict access to all but those with a "need to know" in order to curtail frivolous lawsuits, stop "ambulance chasing" and lawyers sending solicitation letters to accident victims, and prevent rising costs of litigation, insurance, and health care. Representative Downer also expressed concern for the families of deceased accident victims who receive solicitation letters from attorneys who presumably identified the victim through access to accident reports.

Clearly, the state has a legitimate interest in preventing frivolous litigation and curbing legal, health and insurance costs.[7] The record is devoid of evidence as to how restricting access to

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[6]Sibley v. Board of Supervisors of LSU, 477 So.2d 1094 (La. 1985). Act 878 does not discriminate on the basis of race, religion, sex or any other category requiring a stricter standard of scrutiny

[7]The State of Louisiana has no legitimate or appropriate interest in preventing the exercise of the First Amendment right of lawyers to mail solicitation letters to potential clients. Shapero v. Kentucky Bar Association, *supra*.

accident reports to all but the news media would further these interests. To the contrary, the testimony of Mr. DeSalvo and Mr. Harris established that allowing any attorney access to a report prior to undertaking representation would actually cut down on frivolous lawsuits. An attorney would have an opportunity to determine if the potential client's version of the accident was correct prior to filing suit on behalf of the client. This testimony was uncontradicted. Furthermore, as plaintiffs argue in brief, injuries from automobile accidents will occur regardless of whether the injured person receives a solicitation letter.

However, assuming there exists a rational relationship between restricting access to accident reports and the interests stated above, the question for equal protection purposes is whether the discriminatory scheme has a rational relationship to those interests. Does allowing the news media access to a particular report but not a lawyer or any other citizen in any way further the state's interest in reducing costs and stopping frivolous lawsuits? The answer has to be no. The most obvious reason is that if the news media has access to the details of an accident, it can publish or broadcast the incident and therefore make the details known to the entire community. At that point, the victims could be bombarded with solicitations.[5] Furthermore, when questioned by the Court, Representative Downer acknowledged that allowing a lawyer or individual citizen to obtain a particular accident report would not conflict with the purposes of the act.

Defendants' argument that under the wording of Act 878 a lawyer could obtain an accident report without having entered into a contract to represent the victim is without merit. The court completely agrees with the emphatic testimony of Mr. DeSalvo that it would be unethical, deceitful and impractical for a lawyer to

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[5]The state made no real attempt to argue the interest of the privacy of its citizens. Any privacy interest would be eradicated by allowing the news media access to the reports.

inform a law enforcement agency that he represents an accident victim when he has not yet been retained.

Because the Court finds that Act 878 violates the equal protection clause, plaintiffs' First Amendment challenge, while it might have merit, will not be addressed.

Judgment is hereby rendered in favor of the plaintiffs, declaring that Act 878 is unconstitutional and enjoining its enforcement.

Baton Rouge, Louisiana, this 4th day of September, 1992.

/s/ Michael E. Ponder
Judge

APPENDIX C

NUMBER 384,535 DIVISION D

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

VINCENT J. DESALVO AND JACK PATRICK HARRIS

V.

THE STATE OF LOUISIANA AND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, OFFICE OF STATE POLICE

SUPPLEMENTAL MEMORANDUM SUBMITTED BY PLAINTIFFS

MAY IT PLEASE THE COURT:

This supplemental memorandum is submitted on behalf of plaintiffs following the evidentiary hearing of Tuesday, August 25, 1992. At the hearing, this Honorable Court consolidated the matter for final disposition of the permanent injunction and declaratory judgment.

Plaintiffs continue to rely upon the law discussed in the previous memorandum submitted by plaintiffs. This memorandum will concentrate on the facts elicited at the evidentiary hearing.

Plaintiffs first called Representative H.B. "Hunt" Downer, Jr., author of Act 878. Representative Downer was cross-examined regarding the intent behind Act 878. He testified Act 878 was promulgated for the following reasons:

(1) Restrict accessibility to accident reports on a "need to know" basis;
(2) Contain the high cost of insurance by prohibiting unscrupulous trade practices;
(3) Stop Frivolous litigation;
(4) Prevent attorneys from sending solicitation letters;
(5) Prevent chiropractors from "running up medical costs";
(6) Stop ambulance chasers;
(7) Prevent solicitation letters from being sent to dead people;
(8) Prevent chiropractors from sending solicitation letters;
(9) Allow news-gathering organizations access to news-worthy accidents;
(10) Prevent spiralling health care costs; and
(11) Prevent spiralling legal costs and unnecessary litigation because of high defense costs due to increased filing of law suits.

Although Representative Downer attempted to articulate reasons other than the prohibition of the mailing of solicitation letters by attorneys and chiropractors, it was quite obvious during his testimony that the major purpose of this legislation is to prevent chiropractors and attorneys from sending solicitation letters to persons known to have particular legal and/or medical problems. Representative Downer constantly harped on complaints he had received concerning the mailing of letters, from both attorneys and members of the public. He offered no statistics, nor any other rational basis to show that denying access to this information would further a state interest of preventing frivolous litigation or reduce the high cost of insurance. People who are injured in an automobile accident are injured whether they receive a solicitation

letter or not. Representative Downer's attempts to justify this litigation on a basis other than the prevention of solicitation letters was an obvious shallow attempt to show there is a legitimate state interest to be furthered by prohibiting attorneys and chiropractors access to accident reports.

The bottom line is that this legislation was enacted for the sole purpose of preventing attorneys and chiropractors from mailing solicitation letters to individuals known to have particular legal or medical problems. The issue, then, is whether or not such action actually furthers a legitimate state interest. The answer is obvious. The State of Louisiana cannot claim a legitimate state interest in prohibiting the exercise of First Amendment rights under the Constitution of the United States of America. All prohibition against the mailing of solicitation letters has been struck down by the United States Supreme Court in the landmark decision of Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988). In Shapero v. Kentucky Bar Association, *supra*, the United States Supreme Court held that a state may not, consistent with the First Amendment, prohibit attorneys from mailing solicitation letters to individuals known to have particular legal problems. Therefore, the State of Louisiana cannot claim the furtherance of a state interest by denying a constitutionally protected right to attorneys licensed to practice law in the State of Louisiana.

Under the Louisiana Supreme Court's decision in Sibley v. Board of Supervisors of Louisiana State University, 477 So.2d 1094 (1985), the Supreme Court established three classifications for scrutiny by the courts in determining issues of state equal protection under Article 1, Section 3 of the Louisiana Constitution. The first two classifications do not concern us here. Suffice it to say that, in the third classification, which does not discriminate on the basis of race, religion, birth, age, sex, culture, physical condition, or political ideas or affiliations, if a member of the disadvantaged class can show that the legislation does not suitably further any appropriate state interest, then the legislation must be held unconstitutional.

Plaintiffs respectfully submit that there remains a denial of equal protection rights to allow a news-gathering organization to secure accident reports on a "need to know" basis, yet deny plaintiffs access to the same reports under similar circumstances. The news-gathering organizations are treated different from anyone else. Plaintiffs further submit that the State of Louisiana does not suitably further any appropriate interest. All of the reasons given by Representative Downer for the promulgation of the Act do not justify discrimination against plaintiffs as a disadvantaged class.

Additionally, Act 878 prevents plaintiffs from obtaining information regarding an accident in order to make an intelligent decision about whether or not to undertake representation of a client. At the hearing, defendants suggested that it might be appropriate for attorneys to state that they "represent" a client solely for the purpose of obtaining an accident report. A close reading of Act 878 does not justify such a misrepresentation.. Plaintiffs testified that they do not undertake representation until all the facts regarding the accident are investigated, at least to a reasonable degree. This includes review of the accident report. Act 878 provides that such reports will only be available to "attorneys of the parties". It would be untruthful, inappropriate and unethical for an attorney to state that he represents a client when, in fact, he does not.

Under direct examination by the attorney for the State of Louisiana, Representative Downer was asked if there was a difference between the press and attorneys requesting accident reports. Representative Downer responded that the media was a "watch dog" and, accordingly, needed to know the information. Attorneys, on the other hand, examine the accident report only to "hustle business for pecuniary gain".

This distinction articulated by Representative Downer fails to pass constitutional muster under the Louisiana Constitution Article 1, Section 3. The state cannot claim furtherance of a state

interest by denying plaintiffs their First Amendment rights. Since there is no legitimate state interest furthered by this legislation, plaintiffs are denied the equal protection of the law under the Louisiana Constitution and, under the Louisiana Supreme Court's decision in Sibley, *supra*, is unconstitutional as a denial of equal protection.

CONCLUSION

The State of Louisiana has not articulated any appropriate State interest furthered by the promulgation of Act 878. For reasons argued in the first memorandum submitted by plaintiffs, and for reasons set forth herein, plaintiffs respectfully pray that this Honorable Court issue a declaratory judgment specifically finding Act 878 unconstitutional. The plaintiffs have carried their burden of proof establishing that the legislation does not suitably further any appropriate State interest. The State of Louisiana has failed to prove any appropriate State interest furthered by Act 878 which would justify the discrimination against plaintiffs as a disadvantaged class. Act 878 thus violates the Equal Protection Clause of the Louisiana State Constitution and must be struck down.

RESPECTFULLY SUBMITTED:
DESALVO & HARRIS

/s/ Vincent J. DeSalvo
Bar #4900

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Supplemental Memorandum has been sent via facsimile to James Ross, Esq., Attorney for the State of Louisiana at fax number 342-7335 and Howard Elliott, Esq., Attorney for the Louisiana State

Police at fax number 925-4624.

Baton Rouge, Louisiana, this the 2nd day of September, 1992

/s/ Vincent J. DeSalvo
No. 4900

APPENDIX D

NUMBER 384,535 DIVISION D

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

VINCENT J. DESALVO AND JACK PATRICK HARRIS

V.

THE STATE OF LOUISIANA AND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, OFFICE OF STATE POLICE

FIRST AMENDED PETITION BY PLAINTIFF'S

The Amended Petition of Vincent J. DeSalvo and Jack Patrick Harris, domiciled in the Parish of East Baton Rouge, respectfully represents:

1.

Petitioners filed a Petition for Declaratory Judgment/ Injunctive Relief in the above captioned matter on August 14, 1992. Petitioners hereby wish to amend the Original Petition filed herein to add the following paragraph, being paragraph 8:

8.

Petitioners further assert that the stated intent of Act 878 is to deny petitioners the constitutionally protected right under the First Amendment to the United States Constitution to mail written communications to potential clients. Petitioners therefore assert that Act 878 violates the First Amendment to the United States Constitution.

2.

Petitioners show that no answer has been filed to the Petition for Declaration Judgment Injunctive Relief and, accordingly, this Amended Petition is filed as a matter of right under Louisiana Code of Civil Procedure Article 1151.

WHEREFORE, petitioners pray that:

I. This Amended Petition be filed; and

II. Judgment be rendered in favor of plaintiffs against the defendants as prayed for.

RESPECTFULLY SUBMITTED:
DESALVO & HARRIS

/s/ Vincent J. DeSalvo
Bar #4900

/s/ Jack Patrick Harris
Bar #6617

APPENDIX E

NUMBER 384,535 DIVISION D

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

VINCENT J. DESALVO AND JACK PATRICK HARRIS

V.

THE STATE OF LOUISIANA AND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, OFFICE OF STATE POLICE

PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

The petition of Vincent J. DeSalvo and Jack Patrick Harris, domiciled in the Parish of East Baton Rouge, respectfully represents:

1.

Act 878 of the Louisiana Legislature provides for the confidentiality of accident reports, exempting them from the provisions of R.S. 44:1 et. seq., and grants access only to certain parties, including "a news-gathering organization that requests documents relating to the accident". Said Act was signed by the Governor on July 8, 1992 and is effective August 21, 1992.

2.

Petitioners are specifically denied access to accident reports by Act 878 as of August 21, 1992.

3.

Your petitioners challenge the constitutionality of said statute as being in direct violation of the Louisiana Constitution,

specifically Article 1, Section 3, which provides that no person shall be denied the equal protection of the laws.

4.

Your petitioners enjoy a fundamental right to examine public documents as granted by Article 12, Section 3 of the Louisiana Constitution. There is no legitimate, rational basis to deny petitioners the equal right to examine said public documents as would be allowed to a news-gathering organization as provided in the statute. This disparity in the treatment of the rights of different individuals under this law constitutes a violation of the equal protection rights of petitioners.

5.

Also made defendant herein is the Louisiana State Police, for which petitioners seek a preliminary injunction and, in due course, a permanent injunction, prohibiting the office of the Louisiana State Police from denying petitioners access to accident reports.

6.

Petitioners will suffer irreparable injury, loss and damage as a result of Act 878 on and after August 21, 1992, in that petitioners will be denied the fundamental constitutional right to examine public documents and, further, petitioners will be denied the right of equal protection under the Louisiana Constitution. Accordingly, it is necessary that a preliminary injunction be issued herein, enjoining the defendant, the Louisiana State Police, from denying petitioners access to accident reports.

7.

Petitioners specifically pray that this Honorable Court require a nominal bond for the issuance of the preliminary injunction.

WHEREFORE, petitioners pray that:

I. The defendants be ordered to show cause, on or before August 21, 1992, why a preliminary injunction as prayed

for should not issue; and that, on the hearing on this Rule, proof may be adduced by verified pleadings, by supporting affidavits, or by proof as in ordinary cases, or by any or all of such methods, at the election of the party offering the proof; and

II. Judgment be rendered in favor of plaintiff, and against the defendants, perpetuating the preliminary injunction and declaring Act 878 of the Louisiana Legislature unconstitutional.

Respectfully Submitted:
DESALVO & HARRIS
7918 Wrenwood Blvd., Suite A
Baton Rouge, LA 70809-1772
Telephone: (504) 927-7035

/s/ Vincent J. DeSalvo
Bar #4900

/s/ Jack Patrick Harris
Bar #6617

APPENDIX F

ACT 878

REGULAR SESSION, 1992
HOUSE BILL NO.1541

BY REPRESENTATIVES DOWNER, ALARIO, ACCARDO, ACKAL, R. ALEXANDER, ANDING, ARMSTRONG, BERGERON, CARRIER, CHAISSON, COOLEY, COPELIN, DASTUGUE, DEWITT, DIEZ, DIMOS, DOERGE, ELLINGTON, FARRAR, GUIDRY, GUZZARDO, HAIK, HAND, HEBERT, HUNTER, KENNARD, LANCASTER, MCCALLUM, MURRAY, ODINET, PATTI, RIDDLE, ROACH, SALTER, SINGLETON, SITTIG, JACK SMITH, STELLY, STRAIN, SAM THERIOT, STEVE THERIOT, THEUNISSEN, THOMPSON, WARNER, WILKERSON, AND WINDHORST AND SENATOR HAINKEL

AN ACT

To enact R.S. 32:398 (H) and R.S. 44:4 (24), relative to reports of accidents involving motor vehicles; to provide that those reports shall be confidential; to exempt those reports from provisions of the law relating to public records; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 32:398 (H) is hereby enacted to read as follows:

§398. Accident reports; when and to whom made; information aid; fees for copies; fees for accident photographs

H. The reports required by this Section, and the information contained in the reports, shall be confidential, shall be exempt from the provisions of R.S. 44:1 et seq., and shall be made

available only to the parties to the accident, parents or guardians of a minor who is a party to the accident, and insurers of any party which is the subject of the report, or to the succession representatives of those parties, or to the attorneys of the parties or succession representatives, or to a news-gathering organization that requests documents related to the accident. The information in the reports may be tabulated and included in the statistical information published under the provisions of Subsection G of this Section. Nothing in this Section shall prohibit the sale of police accident reports or other driving record information to consumers of on-line driving records under written contract for purchase of records with the Department of Public Safety and Corrections. Further, the information in the reports may be used by the office of motor vehicles for the purpose of maintaining operating records.

Section 2. R.S. 44:4 (24) is hereby enacted to read as follows:

§4 Applicability

This Chapter shall not apply:

(24) To accident reports, and the information in accident reports, as provided in R.S. 32:398 (H).

/s/ John A. Alario, Jr.
Speaker of the House of Representatives

/s/ Sammy Nunez
President of the Senate

/s/ Edwin Edwards
Governor of the State of Louisiana

APPROVED: July 8, 1992